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IN THE

Supreme Court

of the

United States

OCTOBER TERM, A. D. 1964

NO. 223

RAYMOND CARTER,
Petitioner,

V.

ZULA WINTER, also known as MRS. A. E. WINTER, and THERESA HOENOW,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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---

a) THIS CASE IS REPORTED IN 50 Ill. App. 2d 467, 200 N.E. 2d 528, and 32 Ill. 2d 275, 204 N.E. 2d 755, and said opinions are reprinted in the Appendix hereto.

b) GROUNDS FOR JURISDICTION:

i) *The date of judgment:* January 21, 1965.

ii) *Rehearing denied:* March 17, 1965. Stay of mandate granted sixty (60) days from the above date, March 17, 1965. Additional stay of mandate granted thirty (30) days from May 15, 1965 by the Illinois Supreme Court to prepare this Petition for Writ of Certiorari.

iii) *Statutory provisions conferring jurisdiction:* Section 1257 (3) of Title 28, United States Code.

c) QUESTIONS PRESENTED FOR REVIEW:

1) Is civil trial by jury as provided in the United States and Illinois Constitutions a fundamental right protected against arbitrary abridgement by a State Judiciary?

2) Is an arbitrary decision of a State Supreme Court regarding the fundamental right of civil trial by jury a denial of due process as applied to the States through the Fourteenth Amendment?

3) Is the decision of the Illinois Supreme Court such gross and obvious error that it constitutes arbitrary action and therefore a denial of due process?

d) THE CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS APPLICABLE:

Seventh Amendment to the United States Constitution:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Fourteenth Amendment to the United States Constitution, Section 1:

> "Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 2, Section 5, of the Illinois Constitution:

"The right of trial by jury as heretofore enjoyed, shall remain inviolate."

Article 6, Section 5, of the Illinois Constitution:

". . . Appeals from the Appellate Court shall lie to the Supreme Court as a matter of right only (a) in cases in which a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court, . . ."

Chapter 110, Section 101.32 (3) (a), Illinois Revised Statutes, effective January 1, 1964:

"Appeals from the Appellate Court shall lie to the Supreme Court as a matter of right in cases in which a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court. . . ."

e) STATEMENT OF THE CASE:

This is a personal injury action growing out of a collision between an automobile driven by petitioner, Raymond Carter, and one driven by Theresa Hoenow and owned by Zula Winter. The accident occurred on U.S. 66, a short distance north of Springfield, Illinois, on a four lane highway. Petitioner was proceeding south in the outside lane of traffic when his automobile was hit in the rear by the automobile being operated by Theresa Hoenow and proceeding in the same direction.

The case was submitted to a jury in the trial court, which

entered judgment upon the jury verdict finding for plaintiff, your petitioner, assessing his damages at $100,000.00. The Appellate Court of Illinois, Fourth District, 50 Ill. App. 2d 467, 200 N.E. 2d 528, although it found *"that there was sufficient evidence to justify the trial court in denying a directed verdict for the defendants,"* reversed the judgment of the trial court without remanding the case to be submitted to another jury, because it found the verdict to be against the manifest weight of the evidence as to contributory negligence on the part of the plaintiff.

Upon an appeal to the Supreme Court of Illinois, that Court, in its opinion filed January 21, 1965 (32 Ill. 2d 275, 204 N.E. 2d 755), affirmed the judgment of the Appellate Court.

f) THE MANNER IN WHICH FEDERAL QUESTIONS WERE RAISED:

The first stage in the proceedings in which constitutional questions arose was as a result of the action of the Appellate Court in reversing the judgment of the trial court based upon the verdict of a jury and substituting its judgment for that of the jury upon questions of fact.

Upon appeal to the Supreme Court of Illinois, plaintiff-appellant, in support of the jurisdiction of that Court, commencing on page 1 of his Brief filed in that Court (Trans. p. 3-B), stated:

> "This appeal is from a judgment of the Appellate Court, Fourth District, which became final on August 20, 1964, when that Court denied a petition for rehearing. (200 N.E. 2d 528.)
>
> "A direct appeal is authorized because the action of the Appellate Court raises constitutional questions for the first time in this case.
>
> "The Appellate Court reversed a judgment of the

Circuit Court of Sangamon County, entered upon a jury verdict finding for the plaintiff and assessing his damages at $100,000.00, although it held 'that there was sufficient evidence to justify the Trial Court in denying a directed verdict for the defendants.'

"This action of the Appellate Court deprives plaintiff of his right of trial by jury contrary to section 5 of Article II of the Constitution of Illinois, and the seventh amendment of the Constitution of the United States, and deprives him of his property without due process of law as guaranteed by section 2 of Article II of the State Constitution and the fifth amendment of the Federal Constitution, and abridges his privileges and immunities and denies him equal protection of the laws, in violation of the 14th amendment of the Constitution of the United States."

On page 3 thereof, in stating his theory of the case, plaintiff pointed out that:

"The Appellate Court correctly found there was sufficient evidence to submit this case to the jury. It then exceeded its authority on review by invading the province of the jury and substituting its opinion as to the weight of the evidence upon disputed questions of fact. It thereby deprived plaintiff of his constitutional right to have those questions determined by a jury. The judgment of the Trial Court should have been affirmed."

The Supreme Court, in its opinion, after stating the nature of the proceedings below, then stated:

"Plaintiff, appellant herein, contends that constitutional infirmities arising for the first time in the Appellate Court warrant appeal to this court as a matter of right. (Ill. Const., art. VI, sec. 5, S.H.A.; 28 Ill. 2d xxxiii.) Appellant has also complied with time limitations prescribed for petitions for leave to appeal. 28 Ill. 2d xxxi. . . . Since the presence of constitutional questions is dependent upon the interpre-

tation to be given the Appellate Court opinion, and since the appellant has complied with the time limitations applicable to petitions for leave to appeal, we have elected to treat this as an allowed petition for leave to appeal. See Supreme Court Rules 28 and 32 as amended Dec. 2, 1963, effective Jan. 1, 1964, S.H.A. ch. 110, Sec. 101.28, 101.32; 2 I.L.P. Appeal and Error Sec. 8."

The Court, although affirming the Appellate Court, failed to pass upon or discuss the constitutional questions presented by the following Points and Authorities in Plaintiff-Appellant's Brief (Trans. p. 3-B):

II

"The constitutions of the United States and this State provide that in a suit at law the parties are entitled to a jury trial of questions of fact and the Appellate Court is not authorized to reverse a judgment for the plaintiff and make a finding of facts, as such procedure would be an exercise by it of the functions of a jury."

III

"It is not the function of the reviewing Court to substitute its judgment for that of the jury on controverted questions of fact, as the decision of such questions is primarily the exclusive function of the jury."

In the petition for rehearing filed in the Supreme Court of Illinois, plaintiff again pointed out that its opinion denies his constitutional right to a trial by jury, on page 12 thereof (Trans. p. 16), stating:

"That if this Court does adopt this opinion, and it is ultimately reversed, such a reversal will later raise serious questions as it denies the petitioner's constitutional trial by jury insured by Section 5 of Article II of the Constitution of Illinois and the 7th Amendment of the Constitution of the United States,

and deprives the petitioner of his property without due process of law as guaranteed by Section 2 of the State Constitution and the 5th Amendment of the Federal Constitution and denies him equal protection of law and due process as insured by the 14th Amendment of the Constitution of the United States as applied to the States."

The Court again failed to pass on the constitutional questions involved by denying a rehearing in the cause. (Trans. p. 17.)

Plaintiff then filed a motion requesting the Court to reconsider its denial of the petition for rehearing and among other suggestions again pointed out that:

"This Court attempted to avoid this issue by treating this as a petition for leave; however, the action of this Court and the effect of this opinion is to raise substantial State and U. S. constitutional issues by depriving this plaintiff of property without due process of law in the denial of equal protection of the laws through the 14th Amendment as applied to the States as set forth in our briefs and petition for rehearing." (Trans. p. 21.)

This motion was denied on March 18, 1965.

ARGUMENT

I.

THE RIGHT OF CIVIL TRIAL BY JURY IS A FUNDAMENTAL RIGHT INCORPORATED WITHIN THE MEANING OF DUE PROCESS AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT.

We do not presume to inform this Court as to the meaning of due process as used in the Fourteenth Amendment. This Court has come to grips with this issue more often than perhaps any other problem in modern constitutional law. However, the issue presented in this petition is unique, in that we allege a violation of the due process clause of the Fourteenth Amendment by a State Court of last resort. This violation is based upon an arbitrary denial of a basic and fundamental right, the right to civil jury trial. This question is unique because it is hard to envision another case where the violation is so gross and so obvious and where the violation is by the Judicial branch of a sovereign state entrusted with the equal administration of justice. This allegation is not only unique, it is shocking. The shock is engendered not by the allegation alone but in the substance in support of the allegation. We pray the Court take cognizance of the momentous implications of the action taken by the Illinois Supreme Court in this case and reach the merits of this controversy.

It is appropriate in petitioning this Honorable Court to exercise its discretionary writ of certiorari to note that this issue is unsettled. In the Court's own words:

> "The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." (*Malloy v. Hogan*, 378 U.S. 1, 5.)

It is our contention that the right of civil trial by jury is a fundamental right, and that an arbitrary denial by a State Court constitutes a denial of due process as applied to the States through the Fourteenth Amendment.

The obvious divergence of philosophy as to the meaning of due process as used in the Fourteenth Amendment is evident in the expression of both majority and minority opinions in leading cases reported over the past half century. (*Chicago, B. & Q. R. Co. v. Chicago,* 166 U.S. 226; *Twining v. New Jersey,* 211 U.S. 78; *Palko v. Connecticut,* 302 U.S. 319; *Adamson v. Calif.,* 332 U.S. 46; *Gideon v. Wainwright,* 372 U.S. 355; *Malloy v. Hogan,* 378 U.S. 1; *Granville v. Texas,* Case No. 577, Opinion April 5, 1965)

In *Twining v. New Jersey,* 211 U.S. 78, the Court, in relying upon *Chicago, B. & Q. R. Co. v. Chicago,* 166 U.S. 226, held

> ". . . it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law." at 99.

Later Mr. Justice Cardozo, in *Palko v. Connecticut,* 302 U.S. 319, held that certain basic provisions of the Bill of Rights might be "absorbed" within the Fourteenth Amendment if ". . . neither liberty nor justice would exist if they were sacrificed." at 326. Thus was born the concept of "absorption" by which the Court has included selective provisions of the Bill of Rights and applied them to the States. This process as applied in recent cases has been characterized by the present minority of the Court as "incorporation in snatches," (dissent of Mr. Justice Harlan in *Malloy v. Hogan,* 378 U.S. 1). As pointed out by Mr. Justice Douglas in *Gideon v. Wainwright,* 372 U.S. 335, 346, the doctrine of "incorporation" of all the first eight of the Amendments

has been advocated by many Justices, past and present, to insure uniform application of the fundamental freedoms enumerated in our Bill of Rights. The issue was squarely joined in *Adamson v. California,* 332 U.S. 46, and resolved by a 5 to 4 decision that there is no blanket incorporation of the Bill of Rights in the Fourteenth Amendment.

The question is then presented: Is civil jury trial a right protected from arbitrary denial by a State, by the due process clause of the Fourteenth Amendment? Although we subscribe to the "incorporation" philosophy long advocated by the minority of this Court for the reasons stated in the *Adamson* dissent by Mr. Justice Black, we do not rest our case on the Seventh Amendment alone. While it is persuasive to argue that because a specific right is expressly enumerated in our Bill of Rights, it therefore should be applied to the States through the due process clause of the Fourteenth Amendment; it is even more compelling to show that this right was deemed as basic by our Founding Fathers and Framers of our Constitution and therefore was included as a substantive right in both the Federal and State Constitutions. We contend that the right of civil jury trial is "absorbed" into the meaning of due process because it is a basic and fundamental right, and further that it is "implicit in the concept of ordered liberty" as defined in *Palko v. Connecticut,* 302 U.S. 319, 325.

Mr. Justice Goldberg recently observed in his concurring opinion in *Granville v. Texas,* Case No. 577, (Opinion April 5, 1965):

> ". . . certain basic rights are fundamental—not to be denied the individual by either the state or federal governments under the Constitution."

Compiled below are individual and documentary testimonials as to the basic and fundamental nature of trial by

jury as expressed at the time of the formation of this nation.

* * *

Documentary:

"He (the King of England) has combined, with others, to subject us to a jurisdiction foreign to our Constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation . . . for depriving us of the benefit of Trial by Jury." (*Declaration of Independence* (1776)) (Emphasis added)

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." (*Constitution of the United States, Seventh Amendment*)

"The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there be any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government. (*Federalist No.* 83)

"That in controversies respecting property, and in suits between man and man, the ancient trial by Jury is one of the greatest Securities to the rights of the people, and ought to remain sacred and inviolable. Twelfth. That every freeman ought to find a certain remedy by recourse to the laws for all injuries and wrongs he may receive in his person, property or character. He ought to obtain right and justice freely without sale, completely and without denial, promptly and without delay, and that all establishments or regulations contravening these rights, are oppressive and unjust." (*Ratification of the Const. of the U.S., State of Virginia*)

"That the trial by jury in the extent that it obtains by the Common Law of England is one of the greatest securities to the rights of a free People, and ought to remain inviolate." (Ratification of the Constitution of the U.S., State of New York.)

Individual:

Thomas Jefferson:

"I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." 3 *Writings of Thomas Jefferson* (Washington ed.) 71."

Alexander Hamilton:

". . . jury verdicts should be re-examined, if at all, only by a second jury, either by remanding the cause to the court below for a second trial of the fact, or by directing an issue immediately out of the Supreme Court."

Patrick Henry:

". . . Trial by jury is the best appendage of freedom. . . . We are told that we are to part with that trial by jury with which our ancestors secured their lives and property. . . . I hope we shall never be induced, by such arguments, to part with that excellent mode of trial. No appeal can now be made as to fact in common law suits. *The unanimous verdict of impartial men cannot be reversed.*" (Emphasis added)

James Madison, the Father of our Constitution, defined the court's role in protecting this and other freedoms enumerated in our Bill of Rights:

"Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; . . . they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of right."[1]

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(1) I am indebted to Mr. Justice Black's historical documentation in his dissent in *Galloway v. United States,* 319 U.S. 372, for the above individual quotations.

The first case to relate the due process clause of the Fourteenth Amendment to the basic rights enumerated in the Bill of Rights was *Chicago, B. & Q. R. Co. v. Chicago,* 166 U.S. 266. In deciding whether or not a taking of property without just compensation constituted a denial of due process the Court came to grips with the meaning of the Seventh Amendment as applied to the Federal Courts. After recognizing that it could review only questions of law it concluded:

> "Even if we were of opinion in view of the evidence that the jury erred in finding that no property right, of substantial value in money, had been taken from the railroad company by reason of the opening of a street across its right of way, we cannot on that ground, re-examine the final judgment of the state court. We are permitted only to inquire whether the trial court prescribed any rule of law for the guidance of the jury that was in absolute disregard of the company's right to just compensation."

The Court however made this statement:

> "In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."

If such a judgment based upon a jury finding would deny due process for failure to pay just compensation for property taken, would not a judgment that arbitrarily reverses a jury finding in a common law negligence action constitute a denial of due process under the Fourteenth Amendment?

The United States Supreme Court has expressly held that contributory negligence is a question of fact, *not* law.

> "It is well settled that where there is uncertainty as to the existence of either negligence or *contributory negligence,* the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair minded men will honestly draw different conclusions from them." (*Richmond & D. R. Co. v. Powers,* 149 U.S. 43, 45) (Emphasis added)

The Illinois Supreme Court has declared that the plaintiff in this case was guilty of contributory negligence *as a matter of law.* This is not only erroneous, it is an arbitrary pronouncement without basis in law or in fact as will be argued later.

Even allowing for a state's divergence in philosophy inconsistent with our Founding Fathers and the Federal Constitution, we find Illinois to be no free experimenter in the elimination of basic rights. Her Constitution providing for civil jury trials remains unchanged. Her Statutes contain no revolutionary procedure indulging such practice. Her courts previously have recognized the mandates of a Constitutional system and its protection of the jury system.

> "In our opinion section 120 of the Practice Act was intended only to apply to cases where a jury was waived in the trial court by agreement of the parties, or where tried by jury the trial court would have been justified in directing a verdict because the evidence did not tend to establish a cause of action but refused to do so. . . . But if the statute be construed to confer on the Appellate Court the same functions exercised by a jury in a trial court, such construction would render it unconstitutional, as depriving a party of the constitutional right to trial

by jury. As applied to cases which in our opinion it was intended to apply, it would not be unconstitutional." (*Mirich v. Forschner Contracting Co.*, 312 Ill. 343, 357)

However, there has been a conscious and continuing effort throughout this country, and especially in Illinois, to subvert the fundamental and constitutional concept of jury determination of questions of fact. In a paper presented in 1953 before the Society of Trial Lawyers of Chicago, Mr. Stephen A. Milwid accurately predicted the demise of jury determination of factual issues in this State.

"The history of trial by jury in civil actions from its beginning in the Norman Conquest until the present day records a continuous struggle to prevent the rendition of unreasonable verdicts and the motion for directed verdict is the present-day product of that evolution. Its effectiveness as such a device today is questionable. . . .

"The average juryman had become distinctively and incurably plaintiff-minded, and this attitude has characterized him ever since in claims against corporate defendants. The courts then turned to their power to direct verdicts in an effort to assert control over the actions of the jury. This was accomplished in negligence actions by establishing not only standards of conduct by which the defendant's actions were to be measured, but also standards of conduct for the plaintiff. . . .

"The growth of the doctrine of contributory negligence has more than come to a stop. The doctrine itself is almost completely dissipated when the courts refuse to establish standards of conduct pertaining to the doctrine but permit the issue to go to the jury as a general question of fact. . . .

"Although the recent decisions cited in this paper show the trend to permit a jury to pass upon prac-

tically every phase of cases in the general negligence field, there are a few rays of hope on the horizon that the courts may yet attempt to reassert their control over the reasonableness of jury verdicts, and in several recent instances have re-established judicially determined standards of conduct to sustain directed verdicts where the plaintiffs failed to show any deviation on the part of the defendant from those standards. . . .

"It is submitted that the present runaway trend of excessive verdicts does raise a substantial question of public policy. The courts should recognize that the cost of paying such judgments is ultimately borne by the general public. Recently, Chicago papers carried two significant articles. One was the prediction made during an automobile show that the demand for automobiles as a necessity is such that in the foreseeable future the number of automobiles in use will double. The other article concerned the more immediate future, when it announced that automobile public-liability insurance rates were being increased 20 per cent. The function of the court in affording some solution to this question of public policy is clear for, as it has been said: 'It is the judge upon whom the responsibility for the reasonableness of a verdict rests for his is the decision whether the probabilities are so closely balanced that reasonable men can decide either way. If he fails to direct a verdict which should be directed or set aside a verdict which should be set aside, then and only then can a verdict be unreasonable.' This function can be discharged by the court's taking on the function of judicially establishing standards of conduct for both plaintiffs and defendants rather than submitting the determination of such standards to the jury as questions of fact." (*Insurance Law Journal*, March 1953, Number 362, *Motion for a Directed Verdict and "What Isn't a Question of Fact Today?"* by Stephen A. Milwid, pp. 155, 156, 158, 159, 162, 163)

This view when compared to our traditional and constitutional concepts seems foreign until the source is considered. What is so amazing is that this unpalatable argument painstakingly prepared by defense attorneys and insurance companies has been savored and swallowed by a substantial segment of our bench and bar. It is hard to believe that our United States Supreme Court can stomach such an alien philosophy. Mr. Justice Black has long championed the right of both civil and criminal jury trial and in the February issue of the Yale Law Journal in commemoration of his 70th birthday, Professor Leon Green traced briefly the history of civil jury trial and Mr. Justice Black's position. In a closing footnote Professor Green noted:

> "35. Fortunately there are other devoted guardians of jury trial and of the integrity of trial courts to be found in the state and federal systems. Outstanding among these is Justice Carter of the California Supreme Court, whose opinions are probably unequaled for their sturdy advocacy of jury trial. And the scholarly and articulate Judge Jerome Frank of the Second Circuit, although he would like to see jury trial eliminated by constitutional amendment, at least in civil cases, never ceases to urge the overwhelming importance of the *facts* in every litigation, and the exclusive power of the jury, under existing constitutional provisions, to evaluate the facts. Skidmore v. Baltimore & O. RR., 167 F. 2d 54 (2d Cir. 1948); United States v. Antonelli Fireworks Co., 155 F. 2d 631, 665 (2d Cir. 1946). But such judges are rare and they may well be the last great judges who intelligently fight the battle for the jury. For the power of organization, the volume and haste of the flow of business, and the mesh of doctrine are steadily and remorselessly taking jury trial (except for the formality) out of play as a mechanism for the protection of the individual's rights in civil matters." (*The Yale Law Journal,* Volume 64,

February, 1956, Number 4, *Jury Trial and Mr. Justice Black*, by Leon Green, p. 494, footnote 35.)

If the ardent advocates of abolition of the jury system have the courage to submit their position to the American public they should support a constitutional amendment as proposed by Judge Frank rather than to advocate the stealthy encroachment by the judiciary upon basic, fundamental constitutional guarantees. This type of approach, disguised under the name of "efficient administration of justice," was anticipated as early as 1939, when the following commentary was made regarding State Courts abandoning the traditional concept of determinations of fact by a jury:

> "Such a reversal of opinion, if it were isolated, might have little significance, but when many other courts throughout the country are found to be making the same shift and to be doing so despite the provisions of statutes and Constitutions there is revealed one aspect of that basic conflict in the legal history of America—the conflict between the people's aspiration for democratic government, and the judiciary's desire for the orderly supervision of public affairs by judges . . . What seems discreditable to the judiciary in the story which I have related is the fierce resolution and deceptive ingenuity with which the courts have refused to carry out the unqualified mandate of statutes and constitutions. It is possible to feel that the final solution of the problem has been wise without approving the frequently arrogant methods which courts have used in reaching that result." (Howe, *Juries as Judges of Criminal Law*, 52 Harvard Law Review, 582.)

Even if the Illinois Courts have accepted the mandate proposed by Mr. Milwid to carve out and define rules of conduct for the plaintiff, they have not carved a rule, pruned an overextended concept of liability, or defined a legal doctrine. They have indiscriminately used their Judicial

power in brandishing the sword of Justice as a blind and merciless weapon to strike down a disabled and defenseless citizen seeking to have his rights adjudicated by a jury as provided in both the State and Federal Constitutions. This is not Justice, it is arbitrary, oppressive and unjust action by the Judiciary and therefore violative of due process.

This Court has by a process of absorption gradually expanded the concept of due process to incorporate the major provisions of the first eight Amendments to our Federal Constitution. It is academic to argue whether or not the right of civil jury trial is included under the meaning of the due process clause of the Fourteenth Amendment by a process of "incorporation," "absorption" or embraced within the concept "implicit in our system of ordered liberty." The fact remains that it is a basic and fundamental right protected in both the Federal and Illinois Constitutions and ingrained in our Anglo-American common law concept of impartial adjudication. Mr. Justice Black, in his dissent in *Adamson v. Calif.*, 332 U.S. 46, 89, points out that our Bill of Rights and its provisions ". . . may be thought outdated abstractions by some," and concluded, "To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution." The jury system may to many be deemed an "outdated abstraction," however, it is still incorporated as a specifically guaranteed right in both our State and Federal Constitutions and until the people through their collective judgment decide that this fundamental protection is no longer necessary or desirable, it should remain inviolate from arbitrary abridgement by the Judiciary of any State.

II.

A STATE JUDICIARY CANNOT ARBITRARILY DENY ITS CITIZENS A FUNDAMENTAL RIGHT WITHOUT VIOLATING THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

It has often been held that mere error by a State court does not constitute a denial of due process. (*Beck v. Washington,* 369 U.S. 541.) This rule applies even though it may be contrary to previous expressions by the same Court. (*Patterson v. Colorado,* 205 U.S. 454.) However, this court has indicated on several occasions that if the error is so gross and obvious as to approach arbitrary action, the decision itself constitutes a denial of due process by the Judiciary. With reference to condemnation proceedings by a State, Mr. Justice Cardozo distinguished between mere error and arbitrary rulings by a tribunal.

> "To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action. (*Roberts v. New York,* 295 U.S. 264, 277.)

In addition to the arbitrary test, the Court has also intimated that an erroneous decision may constitute a denial of due process if it affects fundamental principles established in our system or jurisprudence.

> "We cannot interfere unless the judgment amounts to mere arbitrary or capricious exercise of power *or is in clear conflict with those fundamental 'principles which have been established in our system of jurisprudence for the protection and enforcement of private rights.'"* (*American Railway Exp. Co. v. Kentucky,* 273 U.S. 269, 273.) (Emphasis added.)

Thus, if the decision is itself arbitrary *or* in conflict with a fundamental principle of jurisprudence, it is violative of due process. What is more fundamental than the ancient

Anglo-American concept of jury trial in the adjudication of private civil litigation? The fact that it was included as a basic and fundamental right in our Federal Constitution and in virtually every State is the most eloquent testimonial of its importance in our philosophy and system of government.

The above cases considered only the proposition as to whether or not the erroneous nature of the decision itself constituted a substantive denial of due process. We are not seeking mere review of an erroneous decision, but protection of a basic and fundamental right. The right of civil trial by jury is an inherent procedural right to submit disputed questions of fact to one's peers. This decision involves more than mere error in the result. It constitutes a basic denial of what has always been considered to be an essential right in civil proceedings. Therefore, this decision of the Illinois Supreme Court denies the petitioner property without due process of law in both the procedural and substantive sense. It is error both in form and result. This error is gross and obvious and therefore arbitrary on its face as will be demonstrated in the following section.

III.

THE ACTION TAKEN BY THE JUDICIARY OF ILLINOIS IS GROSS AND OBVIOUS ERROR AND THEREFORE AN ARBITRARY DENIAL OF DUE PROCESS.

The following paragraph of the Illinois Supreme Court opinion (App. p. 59) is a summary statement of the evidence "most favorable" to the plaintiff and the "applicable law" which establishes the plaintiff's contributory negligence as a matter of law:

> "In our judgment, plaintiff's own testimony that he knowingly turned his comparatively slowly moving auto into the lane of traffic occupied by an approaching car then 120 feet or less away and traveling 75 or 80 miles per hour, when viewed in the light of the rest of

his testimony and that of the other witnesses, conclusively establishes his guilt of contributory negligence as a matter of law. One cannot knowingly expose himself to danger and subsequently recover damages for an injury which, by the employment of reasonable precaution and circumspection, he might have entirely avoided. *Tucker v. New York, Chicago and St. Louis Railroad Co.*, 12 Ill. 2d 532; *Dee v. City of Peru*, 343 Ill. 36; *Illinois Central Railroad Co. v. Oswald*, 338 Ill. 270; *Wilson v. Illinois Central Railroad Co.*, 210 Ill. 603; *Beidler v. Branshaw*, 200 Ill. 425."

The error is gross and obvious for the following reasons:

A.

It uses a "guess" elicited from the plaintiff on cross-examination to declare his "guilt of contributory negligence as a matter of law."

> "In our judgment, plaintiff's own testimony that knowingly turned his comparatively slowly moving auto into the lane of traffic occupied by an approaching car then 120 feet or less away and traveling 75 or 80 miles per hour, when *viewed in the light of the rest of his testimony* . . ." (Emphasis added.)

Instead of being "viewed in the light of the rest of his testimony," this statement is entirely out of context.

Plaintiff testified that when he stopped about 30 feet from the highway he saw the defendant's car on his right about 400 yards away. (Abst. p. 75, Trans. p. 3.) An Additional Abstract of Record was filed by plaintiff in the Appellate Court and it is bound with the Abstract filed with the Illinois Supreme Court containing 170 pages as set forth on page 3 of the record of the Supreme Court of Illinois. On page 14 of the Additional Abstract of Record the plaintiff, upon cross-examination, in response to the question, "And you saw the Cadillac car 30 to 40 yards away?" answer, "Just guessing, yes, sir, I would say, yes."

Plaintiff completed a left turn and proceeded South 169 feet in the outside lane of traffic on a four lane highway before being hit in the rear by defendant's car. (Abst. p. 46, Trans. p. 3.) How can his testimony that he "guessed," when he last saw the approaching car, that it was 30 to 40 yards away, justify the conclusion that he was guilty of contributory negligence as a matter of law? Would the average prudent person expect an approaching car to travel 400 yards, or even 250 to 300 yards, while he was driving approximately 60 feet or 20 yards before completing his turn? Does the court contend he was required to anticipate the unreasonable and unlawful rate of speed of the defendant's vehicle? He started 30 feet from the intersection and crossed 3 ten foot lanes of traffic before making his turn in the outside lane. Does this testimony justify the court's conclusion that he "knowingly exposed himself to danger?"

B.

It ignores material, undisputed and objective facts in reaching its conclusion.

"... *and that of other witnesses,* ..." (Emphasis added.)

The facts and circumstances surrounding the accident are nearly all controverted. Each witness gave different subjective estimates of time, speed and distance which is normal where there are several occurrence witnesses. Only three objective facts are undisputed:

1. That the defendant collided with the rear of the plaintiff's automobile while both were occupying the same lane of traffic and proceeding in the same direction on an unobstructed four lane highway.

2. That the point of impact was *169 feet South of the intersection.*

3. That the defendant's skid marks extended 112 feet to the point of impact.

These facts were established by State Trooper James Merrifield who investigated the scene of the accident. (Abst. p. 46, Trans. p. 3.) *It is apparent from the above facts that the defendant's brakes were not applied until after she had passed 57 feet beyond the intersection.* Other reasonable inferences in light of these facts and the disputed issues of estimated distances, speed and time were submitted to the jury. In the words of the Court on page 5 of its opinion:

> "In determining whether defendants' motion for a directed verdict should have been allowed, all of the evidence, *when viewed most favorably to plaintiff,* must totally fail to establish one or more essential elements of the case." (Emphasis added.)

Instead of viewing the evidence in a favorable light, this opinion indulged in illusory calculations of estimated distances and speed to discredit plaintiff's witnesses. (Illinois Supreme Court's Opinion (App. pp. 58-59). These estimates are recollections of facts which admittedly may be inaccurate, but inaccuracy of either recollection or estimate of *facts* does not establish contributory negligence *as a matter of law.* To reach the conclusion that the plaintiff was guilty of contributory negligence as a matter of law, the Court relies upon subjective factors — in other words, questions of fact. To do this the Court deliberately ignored the only objective and undisputed facts in this record.

This opinion, although conceding that it would be improper to take a part of plaintiff's testimony and designate it as a judicial admission of contributory negligence, then emphasizes an estimate which he characterized as a "guess" as to when he last saw defendant's car and states

"plaintiff's own testimony that he knowingly turned his comparatively slowly moving auto into the lane of traffic occupied by an approaching car then 120 feet or less away and traveling 75 or 80 miles per hour, . . ., conclusively establishes his guilt of contributory negligence as a matter of law." Certainly, this is far from ". . . *viewing the evidence in a light most favorable to plaintiff.*" (Emphasis added.)

C.

It misappropriates authorities to bolster its contention that such a "guess" or estimate is a judicial admission barring recovery. The authorities cited expressly hold contrary to the Court's contention.

> ". . . *conclusively establishes his guilt of contributory negligence as a matter of law.*" (Emphasis added.)

Until this opinion, a statement by the plaintiff which may constitute a miscalculation of speed or distance based upon relative space and time perceptions has not constituted contributory negligence as a matter of law. (*McCormack v. Haan,* 20 Ill. 2d 75, 78-79.)

On page 5 of this opinion (App. p. 58) the Illinois Supreme Court cited *McCormack v. Haan, McCormick on Evidence,* pp. 513, 516, and 9 *Wigmore on Evidence,* 3rd Ed., Sec. 2594(a). *The McCormick and Wigmore* citations were taken directly from the *McCormack* opinion, apparently without direct reference because each authority expressly condemns the exact practice indulged in by the Court in this opinion. *McCormick,* on page 515, states:

> "Obviously, this general rule demands many qualifications and exceptions. Among these are the following: (1) The party is free to contradict, and thus

correct, his own testimony; only when his own testimony taken as a whole unequivocally affirms the statement does the rule of conclusiveness apply. *The rule is inapplicable, moreover, when the party's testimony* (2) may be attributable to inadvertence or to a foreigner's mistake as to meaning, or (3) is merely negative in effect, or (4) *is avowedly uncertain, or is an estimate or opinion rather than an assertion of concrete fact, or* (5) *relates to a matter as to which the party could easily have been mistaken, such as the swiftly moving events just preceding a collision in which the party was injured.* (Emphasis added.)

Wigmore, Sec. 2954 (a), states:

"Having in mind the conclusive nature of a judicial admission . . . that it allows the judge to direct the jury in their deliberations to take the admitted fact as positively settled and beyond their power to doubt—having these extreme consequences in mind, can it be said that a party's testimony on the stand as a witness may sometimes amount to a judicial admission?

. . .

Testimony in court is an elusive matter of mental operations. It is the culmination of much talk and reflection and memory-stirring between all concerned. It is full of surprises at the trial. The truth of the case depends on a comparison of what all the witnesses say and all the circumstances indicate. *A rule which binds a party to a particular statement uttered on the stand becomes an artificial rule. It is out of place in dealing with testimony.* Let the judge test each case by itself." (Emphasis added.)

Professor Cleary, in commenting on the *McCormack* decision, states:

"Illinois cases have recognized that the testimony of a party, adverse to his cause, may be binding upon him as a judicial admission. Satisfactory application of the principle would seem to require that the matter be within his personal knowledge, without reasonable

> chance of mistake, and that the admission be clear and unequivocal. See *McCormack v. Haan,* 20 Ill. 2d 75, 169 N.E. 2d 239 (1960). Otherwise the result is to penalize honest mistake and confusion. Cleary's Handbook of Illinois Evidence, 2d Ed., Sec. 17.12, p. —."

Misstatement of authority, whether or not intentional, is a gross abuse of the judicial prerogative. When it is done by a State court of last resort there is no remedy other than to petition for rehearing. Our petition pointed out in detail the legal and factual errors in the opinion; it was denied. Our motion to reconsider this denial in light of the Constitutional issues presented was denied. There is no remedy for this gross and obvious error in reversing a jury verdict; *unless this Court exercises its discretion in the issuance of a writ of certiorari.* In sanctioning use of the directed verdict by the trial judge in Federal Courts, this Court held:

> "If there is abuse in this respect, the obvious remedy is by correction on appellate review." (*Galloway v. United States,* 319 U.S. 372, 395.)

Where the abuse is committed by a Court of last resort there is no such comparable right.

D.

It ignores recent precedent which declared inapplicable the authorities used to support the Court's present contention.

> ". . . One cannot knowingly expose himself to danger and subsequently recover damages for an injury which, by the employment of reasonable precaution and circumspection, he might have entirely avoided. *Tucker v. New York, Chicago and St. Louis Railroad Co.,* 12 Ill. 2d 532; *Dee v. City of Peru,* 343 Ill. 36; *Illinois Central Railroad Co. v. Oswald,* 338 Ill. 270; *Wilson v. Illinois Central Railroad Co.,* 210 Ill. 603; *Beidler v. Branshaw,* 200 Ill. 425."

The cases cited by the Court in support of its opinion (*Tucker v. New York, Chicago and St. Louis Railroad Co.*, 12 Ill. 2d 532; *Dee v. City of Peru*, 343 Ill. 36; *Illinois Central Railroad Co. v. Oswald*, 338 Ill. 270) had been rejected earlier by this same Court as inappropriate in cases of this type. (*Pennington v. McLean*, 16 Ill. 2d 577.) The plaintiff expressly relied upon this Court's decision in the *Pennington* case. (Plaintiff's Brief, pp. 25-26; Trans. p. 3B.) This opinion has failed to acknowledge the rules of law set forth in that case and has not overruled, modified or even attempted to distinguish its holding. It is submitted that the *Pennington* case cannot be distinguished and the facts in this case are even more compelling that the Court reach the same conclusion. Although error, even though inconsistent with prior opinions, is not in itself a denial of due process, it is additional evidence of the arbitrariness of this decision.

In *Pennington*, the Appellate Court first reversed, without remand, a jury finding on the ground that the plaintiff's intestate was contributorily negligent as a matter of law. (*Pennington v. McLean*, 18 Ill. App. 2d 316.) The basic facts were that the plaintiff's intestate drove his truck from a side road across the defendant's lane of traffic at an intersection on a preferential highway. The truck was struck *in the intersection* by the defendant's auto. *In support of its decision the Appellate Court cited the same cases relied upon by this opinion.* (*Tucker v. New York, Chicago and St. Louis Railroad Co.*, 12 Ill. 2d 532; *Dee v. City of Peru*, 343 Ill. 36; *Illinois Central Railroad Co. v. Oswald*, 338 Ill. 270.) See *Pennington v. McLean*, 18 Ill. App. 2d 316, 330-332.

The Illinois Supreme Court then reversed the Appellate Court's decision in *Pennington*. In so doing it declared those same cases inapplicable:

> "Nor is the *Tucker case,* dealing with the right of way at a railroad crossing, determinative of the duties and obligations of motorists crossing intersecting streets involved here. Nor do we find analogous *Dee v. City of Peru,* 343 Ill. 36, where the plaintiff's intestate ran over a barrier at an open bridge, or *Illinois Central Railroad Co. v. Oswald,* 338 Ill. 270, where plaintiff admitted that she carelessly went into a place of danger."

The cases cited in this opinion in support of this rule of law have one thing in common. The instrumentality or the condition which caused the injury to the plaintiff was admittedly not seen or anticipated at a place where a known dangerous condition exists. In every case the plaintiff failed to keep a proper lookout or "looked but did not see." In this case it is undisputed that the plaintiff was aware of the approach of the defendant's automobile.

This was not a crossing or intersection collision. It was a rear end collision of two moving vehicles 169 feet beyond the intersection. It is especially significant that the *Pennington* case was a *crossing collision* and thus the Court's observation set forth below is even more compelling where the *rear end collision* in this case was some 169 feet farther down the highway.

> "The position of the vehicles immediately after the impact afforded further evidence from which the jury could conclude that the collision occurred at an advanced stage of the truck's crossing the intersection . . .
>
> "The fact that the collision occurred at such an advanced stage of the truck's crossing is significant not only in establishing defendant's negligence in failing to see the truck and take precautions, as defendant was obliged to do once the truck had entered the highway (*Middendorf v. Loiseau,* 335 Ill. App.

338), but also bears upon the length of time the truck had been in the intersection. This, in turn, reflects upon whether defendant's car could or should reasonably have been regarded as an 'immediate hazard' at the time the truck entered the intersection. That inquiry is also affected by the speed at which the vehicles were traveling." (*Pennington v. McLean,* 16 Ill. 2d 577, 584.)

There is no question that the plaintiff maintained a proper lookout and was aware of the approach of the defendant's automobile. His judgments as to rate of speed at the time of the trial were opinions, as were the other statements estimating distance and time. With regard to judging related speed and distance this Court, in *Pennington,* applied the statutory "immediate hazard" test.

"Thus, a person approaching a preferred highway is not required to stop, either at the stop sign or at the intersection line, long enough to permit *any* car that he observes on the highway to pass, regardless of its distance from the intersection. (*Little v. Gogotz,* 324 Ill. App. 516; *Leech v. Newell,* 323 Ill. App. 510.) The statute requires only that he motorist confronted by a stop sign may, exercising reasonable care, proceed across the intersection after he has stopped and yielded the right of way to such vehicles on the through highway as constitute an 'immediate hazard.' 164 A.L.R. 24, 25; *Little v. Gogotz,* 324 Ill. App. 516; *DeLegge v. Karlsen,* 17 Ill. App. 2d 69.

"The Illinois decisions, however, do not provide a precise formula for determining whether a particular vehicle has conformed to set standards; *that question must be determined by the jury.* (*DeLegge v. Karlsen,* 17 Ill. App. 2d 69; 164 A.L.R. 24, 25), *and involves considerations as to relative speeds and distances of the vehicles from the intersection. Middendorf v. Loiseau,* 35 Ill. App. 338; *Kirchoff v. Van Scoy,* 301 Ill. App. 366." (*Pennington v. McLean,* 16 Ill. 2d 577, 583.) (Emphasis added.)

The Supreme Court opinion taken in conjunction with the Appellate Court opinion is gross and obvious error on its face and therefore an arbitrary denial by a State of a person's property without due process of law.

E.

It summarily disposed of the constitutional issues timely and properly asserted which were the basis of this appeal under the Constitution and Law of the State of Illinois.

The opinion of the Supreme Court summarily concluded:

> "Consequently, we hold that both the Trial Court and Appellate Court were in error concerning the denial of defendants' motion for a directed verdict, which should have been granted. It is, therefore, unnecessary to consider the other issues raised. However, since it is only the judgment of the Appellate Court and not its reasons therefor which determine affirmance or reversal, . . . we affirm its ultimate determination."

It is a rare instance when a State's highest court will, by its own act, deny justice. It is even more rare when a State's court of last resort, by its own act, will arbitrarily deny an individual the fundamental right of jury trial and therefore deny him of due process. This is a most serious allegation. However, it is serious only because it involves a right rooted firmly in "our concept of ordered liberty."

To deny this petition, this Court must satisfy itself that there is no substantial federal question and that the right to civil jury trial can arbitrarily be denied by a State judiciary without a substantial violation of the due process clause of the Fourteenth Amendment. There is substance to both the protection sought and the constitutional issues raised. We pray that the Court reach the substance of this most serious invasion of this individual citizen's rights.

The fact that this is a civil rather than a criminal case does not mean that this individual was any less denied due process of law. A person totally and permanently disabled by the negligent act of another, and deprived of a money judgment based upon a jury's finding of fact, is aggrieved no less than one who is illegally imprisoned. Life, liberty and property are equally protected by the terms of the due process clause of the Fourteenth Amendment. An invalid is already deprived of liberty through the infirmity caused by another's negligent act. His only legal redress is the pursuit of a civil action against the wrongdoer. This is basic. It is a right to property which cannot be taken away without due process. The State Courts of Illinois have arbitrarily and yet conclusively determined that this petitioner was not entitled to submit his cause of action to a legally constituted jury.

We offer this prayer on behalf of an individual. He asserts no rights other than his own. He is assisted in no way by any interested organization or organized minority; his only recourse is to the due process of law assured each individual "person." He is handicapped in that his cause carries no *immediate* far reaching social, economic or political implication. His right is personal and individual. He petitions this Court as his last resort to protect a basic right and privilege which has arbitrarily been denied him by State action.

It is one thing to err or to be inconsistent in applying the law. It is yet another thing to intentionally ignore objective facts, consciously disregard controlling precedent and grossly misrepresent citations of authority and in so doing to arbitrarily deny an individual citizen the constitutionally protected right of trial by jury. On the facts of this case, if this is not an arbitrary denial of due process of law by a State, then the protection of due process is illusory and

this litigant, and henceforth all future litigants, will be subject to the possible caprice of the courts as to which rule of law to apply. *Pennington v. McLean* may in the future be used as the rule to insure the integrity of jury awards only to white, protestant, fourth generation Americans, and *Carter v. Winter* reserved as a judicial device to defeat any litigant who, for reasons extraneous to the record, finds his cause in disfavor of the particular trial or review court. Conceivably, even if these rulings are never again applied arbitrarily, they still sow within them the seeds of arbitrary application and promise a bitter harvest of confusion and chaos in the attempt of lower courts of our State to administer equal justice through the consistent application of the fundamental constitutional safeguard of civil trial by jury.

We cannot offer an explanation as to why the Illinois Court abandoned basic constitutional and common law principles in this decision. Motivation is not essential to prove the arbitrariness of this decision, this error is gross and obvious on its face. Suffice it to say that a refusal by this Court to exercise its discretion to review this decision will lend color to the arbitrary departure from constitutional principles by the Illinois courts. On numerous occasions this Court has pointed out that a denial for a petition of certiorari in no way indicates approval of the lower court's decision or opinion. While this may be true, it is nevertheless a tacit expression that this Court will not consider review of arbitrary denials of basic rights if the State judiciary couches them in the guise of "questions of State law." The Supreme Court of Illinois accepted appeal on a constitutional issue, a matter of right as provided in Chap. 110, Sec. 101.32 (3) (a), Illinois Revised Statutes, effective January 1, 1964. It then turned a deaf ear to the substance of the constitutional issue raised and treated it

as a "Petition for Leave to Appeal" in order that it could ignore the obvious unconstitutional action of the Appellate Court. In affirming the result of the Appellate Court it undertook to remedy the form and ignore the substance by declaring that there should have been a directed verdict because the plaintiff was contributorily negligent as a matter of law. The Supreme Court of Illinois has decided with a stroke of a pen that a man totally disabled by the negligent act of another was not entitled to submit his case to a jury because he made an unfortunate "guess" upon cross-examination which in the Court's view was not sufficient, taken together with the remaining evidence, to establish due care. It is difficult to envision a more flagrant and obvious denial of due process. Seven (7) men by a single paragraph have changed a question of fact to a matter of law, ignoring the express finding of the Appellate Court, the ruling of an experienced trial judge and a unanimous verdict of a legally constituted jury. It was never envisioned by the authors of our Constitution that any citizen could be denied so basic a right in such a cavalier and arbitrary fashion.

Ours is a constitutional government. The judiciary is obliged to conform its responsibilities to the mandates of the constitution to the same extent as the Executive and Legislative branches of our State and Federal Governments. Regardless of formal phraseology, contributory negligence in substance remains a question of fact which the courts have traditionally tested against the time honored standard of the "reasonable man." This standard has always been determined and applied by a jury. If the courts do not pretend omniscience then this is the only human standard against which to judge a person's conduct. As demonstrated by argument and citation this was the traditional function of a jury which was deemed essential by the

drafters of the Federal Constitution, and which was arbitrarily usurped by the Illinois Supreme Court.

CONCLUSION

Your petitioner prays that the Court grant writ of certiorari to the Supreme Court of Illinois, and upon consideration of the case upon the merits will reverse the judgment of that Court and remand the cause with directions to reverse the judgment of the Appellate Court, Fourth District, of Illinois, and to affirm the judgment of the Circuit Court, Seventh Judicial Circuit of Illinois, Sangamon County, Springfield, Illinois.

Respectfully submitted,

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APPENDIX

ILLINOIS APPELLATE COURT OPINION

General No. 10543 **Agenda No. 4**

REYNOLDS, J.

This is a personal injury action growing out of a collision between an automobile driven by defendant Theresa Hoenow and owned by defendant Zula Winter, and an automobile driven by plaintiff Raymond Carter. The accident occurred on December 18, 1960, at about 3:00 o'clock p.m. on U.S. Route No. 66, a short distance north of Springfield, Illinois. The weather was clear and cold, and the pavement was dry. The highway at the point of collision is four-laned, each lane being 10 feet in width, with two lanes for northbound traffic and two lanes for southbound traffic. There is no curb, or separation of the two inner lanes other than a center line on the pavement. The highway is concrete.

Raymond Carter, with his wife in the front seat with him and their small child standing behind them, started from his home which is a short distance east of the highway, and drove his automobile on a private driveway until he came to U.S. 66. His testimony and that of his wife was, that he stopped just before he entered the highway, then drove directly across the two northbound lanes, and the inner lane of the southbound lane, until he entered the outer southbound lane and there he turned to the left and proceeded down the outside southbound lane at a speed of about 35 miles per hour until he was struck in the rear by the Winter automobile. The left rear corner of Carter's automobile was struck by the right front

corner of the Winter automobile. The collision knocked the Carter automobile down the road until it was braked to a stop by the driver. The Winter automobile stopped about the point of impact. Carter said he saw the Winter car when he was about 30 feet east of U.S. 66. He estimated it was then about 400 yards to the north. At that point, he drove across the three lanes of the highway, and then turned south, in the outer southbound lane. He estimated the speed of the Winter car at 75 or 80 miles per hour. He said he continued to watch the Winter car as he drove across U.S. 66 and until he made his turn and headed south. His estimate was that he traveled 120 to 130 feet in the southbound lane until the collision. On cross examination, he admitted that he last saw the Winter car through the right front door at a distance of about 30 to 40 yards away. Mrs. Carter in her testimony estimated the Winter car to be three to four hundred yards away when the Carter car stopped on the east side of the highway. Mrs. Carter testified she was knocked out for a few seconds and when she regained consciousness, she was sitting in the front seat with Mr. Carter sitting beside her holding to the steering wheel. Mrs. Carter was not seriously injured and apparently the child in the back was not injured. Raymond Carter, immediately after the accident went across the highway to his brother Luke Carter's home to get his brother and then went back to the scene of the accident. Then Raymond Carter, Luke Carter, Mrs. Raymond Carter and the little boy went to the Luke Carter home. Neither Raymond Carter, his wife or his son went to the hospital. The next day, Raymond Carter returned to his regular work in the mill of Luke Carter. The next day he drove the mill truck to Arkansas and was gone about four days. About a week after the accident, he helped rope and load a 200 pound hog in the

truck. On the 11th day after the accident plaintiff Raymond Carter had a heart attack and while in the hospital had several strokes which resulted in partial paralysis and total disability. Plaintiff's action was based on the claim that the injuries sustained in the collision caused the heart attack.

The cause was tried before a jury and the jury found for the plaintiff and assessed his damages at $100,000.00. Defendants' post trial motion being denied, defendants appeal to this Court.

On appeal defendants raise the following points: (1) There was no credible evidence of negligence on the part of the defendants, (2) Plaintiff was guilty of contributory negligence, (3) There was no competent evidence of causal connection between the accident and plaintiff's heart attack and disablement, and (4) The Trial Court committed prejudicial error in refusing Defendant's Instruction No. 15.

Defendant Theresa Hoenow, an employee of Zula Winter, was driving the Winter car. Riding beside her in the front seat was Mrs. Winter's brother, Ellsworth Brown. Mrs. Winter was in the back seat, but her eyesight was such that she was almost totally blind and could not see what was happening. Both Mrs. Hoenow and Mr. Brown estimated the speed of the Winter car at 50-55 miles per hour before the brakes were applied. Mrs. Hoenow testified she first saw the Carter car when it was crossing the inner southbound lane. She estimated the distance at between 100 and 125 feet. She attempted to pull to the left but was unable to do so and when the collision occurred, the Winter car was straddling the dividing line between the two southbound lanes.

Mr. Ellsworth Brown testified he first saw the Carter car when it was crossing the two inner lanes. It was then about 100 to 125 feet away. This witness testified that the Carter car came across the two lanes and then turned into the lane in which the Winter car was traveling south. This witness stated he had observed the posted speed limits from time to time and Mrs. Hoenow was driving within the speed limits.

Illinois State Highway Policeman James Merrifield was called to the scene of the accident and arrived shortly after it happened. He testified he found skid marks made by the Cadillac of Mrs. Winter and these marks were 112 feet in length. He stated the point of impact was 169 feet south of the line of the Carter driveway extended across the highway.

Luke Carter, brother of the plaintiff, testified he saw the Winter automobile 1000 feet away, watched it and his brother's car, and saw the accident. He saw this through a window, seated about two feet from the window. He estimated the speed of the Winter car at 80 miles per hour. He estimated the speed of the Carter car just before the collision at 35 miles per hour. Although Luke Carter testified he saw the accident, it does not appear that he left the house, but stayed inside until his brother came back across the road to enlist his help.

Alexander Langsdorf, a witness for the plaintiff, testified as an expert on the coefficient of friction between tires and dry concrete pavement, or in other words, skid marks and their distances. This witness was asked a long, involved and complicated hypothetical question and his testimony was that under the facts as posed by the hypothetical question the accident could not have happened, basing his answer on the testimony of Mrs. Hoenow that

at the time of the collision she was traveling 30 miles per hour and the testimony of Mr. Carter that he was traveling 35 miles per hour. This witness stated that if the speed of the Cadillac was 70 miles per hour, the speed of the Cadillac at the time of impact would have been 47 miles an hour which would have caused a mild jolt. Basing his answer on a speed of 80 miles per hour by the Cadillac the speed of the Cadillac at the time of the collision would have been 60 miles per hour. This witness also testified that if a person driving along the highway is struck in the rear by another vehicle, the person so struck would be thrown forward and not backward.

George Engelbach, a transport driver, testified he was driving north on U.S. 66 and saw the accident. He was driving in the outer northbound lane. He first saw the Carter car come from behind a fence on the east side of the highway and said it did not stop, but seemed to pick up speed as it entered the highway. That the Carter car slanted across the highway in a southwesterly direction. This witness estimated the distance of the Cadillac from the Carter Mercury at 50 feet when the Mercury crossed the center of the highway. This witness stated the Cadillac was not exceeding the speed limit. When the witness stopped his transport, he was within 200 feet of the point of impact of the two vehicles. He was near the Carter driveway. This witness stated unequivocally that Carter did not stop before entering the highway, but that he seemed to be picking up speed, and that Carter was slanting across the highway to the southwest. He showed wet tire-marks of the Carter car to the state trooper.

Dr. Leon Lando, a general practitioner, was the attending physician when Carter was admitted to the hospital

on December 29, 1960. He found no outward evidence of any injury to Carter and based on subjective symptoms, concluded Carter had suffered an acute coronary occlusion. When first admitted, Carter did not tell Dr. Lando about the alleged chest injury, but did so later. The doctor's conclusion, based upon the statement of Carter that he was thrown with great force against the steering wheel, was that there could or may have been a causal relationship between the injury to his chest wall and the following coronary occlusion. Dr. Lando is not a heart specialist, and later called in Dr. Chauncey Maher as a heart specialist on the case.

Dr. John J. Meyer, a doctor of general and traumatic surgery, examined Carter in June 1963, two and one-half years after his first heart attack. This witness, based upon the story that Carter was thrown against the steering wheel, testified that there was a possibility that there was a connection between the alleged chest injury and the heart attack. On cross examination when asked if he could say that the heart attack was caused by the accident, said that "All I can say is that I can't say it wasn't." Questioned if the connection was a probability, the witness would not answer, except to qualify his answer, that without examining the subject at the time of the injury he could not say.

Dr. Alton Joseph Morris testified as to three possibilities. First, there could have been a direct injury to the heart muscle; second, there could have been a direct injury to the blood vessels of the heart or the coronary arteries; and third, coincidental occurrence. The first two possibilities were based upon the story of Carter being thrown against the steering wheel. On cross-examination, this doctor said that based upon such an injury,

the heart attack could have been connected with the injury. That such connection was a possibility, but he was not excluding the possibility that the heart attack was totally unrelated to the accident. This witness had not treated or examined Mr. Carter.

Dr. Thomas J. Walsh, asked a hypothetical question based upon a person being thrown against the steering wheel of an automobile and a subsequent heart attack some 11 days later, stated there may, or could have been, a relationship between the trauma to his chest wall and the subsequent cardiac problem. This witness admitted that there was the other possibility and, that was, that the occlusion was purely coincidental to the trauma.

The testimony of Dr. Lando, Dr. Meyer, Dr. Morris, and Dr. Walsh was based upon the supposition and theory that Carter had been thrown into the steering wheel with great force by the impact of the collision.

Dr. Chauncey Maher, a heart specialist, called in by Dr. Lando, first examined Mr. Carter on January 7, 1961, some nine days after he suffered his initial heart attack. His testimony, based upon the history of the case given him by Mr. Carter, the history given him by Dr. Lando, and his examination of the patient, was that there was no causal connection between the accident and the heart attack. Asked if Carter or Mrs. Carter had told him about any injury to the chest, he said "No." He said Carter told him he had been thrown over the back seat by the collision and had landed on the top of the back seat and had sustained injuries to the back of his neck and the upper parts of the muscles between his shoulders.

The first point raised by the defendant on appeal is that there was no credible evidence of negligence on the part of the defendants, and the Court should have di-

rected a verdict for the defendants. With this contention, we cannot agree. There was evidence of skidding for a distance of 112 feet by the Winter car. There was evidence of the expert on friction between rubber and pavement, Dean Langsdorf, that the Winter car must have been traveling at a high rate of speed, well over the speed limit. There is the testimony of Luke Carter, Raymond Carter and Mary Carter estimating the speed of the Winter car at 80 miles per hour. There is the evidence of the Carters, Raymond and Mary, that they had made the turn and were proceeding south on the highway when hit, which, coupled with the evidence of the State Highway Policeman Merrifield, placed the point of impact some 169 feet south of a line projected westerly from the Carter roadway across U.S. 66. While this testimony is not conclusive, it is in the record and cannot be ignored by the Trial Court or this Court.

The general rule is that negligence and contributory negligence are questions of fact for the jury, and so long as a question remains whether either party had performed his legal duty or has observed that degree of care imposed upon him by the law, and determination of question involves the weighing and consideration of the evidence, the question must be submitted as one of fact. *Peterson v. Hendrickson,* 335 Ill. App. 223; *Lowe v. Gray,* 39 Ill. App. 2d 345; *Cloudman v. Beffa,* 7 Ill. App. 2d 276. Even where the facts are admitted or undisputed, but where a difference of opinion as to the inference that may legitimately be drawn from them exists, the questions of negligence and contributory negligence ought to be submitted to the jury — it is primarily for the jury to draw the inference. *Lowe v. Gray,* 39 Ill. App. 2d 345.

The law in reference to the defendants' contention that there was no credible evidence of negligence on the part

of the defendants and that the Court should have directed a verdict for the defendants as a matter of law, is equally applicable to the defendants' second contention, that the plaintiff Raymond Carter was guilty of contributory negligence as a matter of law.

Defendants contend that there was no competent evidence of causal connection between the accident and the plaintiff's heart attack. This question also, is a question of fact for the jury. Four of the doctors testified, based upon the supposition that Carter had been thrown against the steering wheel with great force and had sustained a chest injury at the time, that there was a possibility that there was a causal connection between the supposed chest injury and the heart attack, although all of them admitted that the heart attack could have been coincidental. Dr. Chauncey Maher, the heart specialist testifying for the defendants, testified positively that there was no such connection.

The final contention of the defendants is that the Trial Court committed reversible and prejudicial error in refusing to give Defendants' Instruction No. 15. The Trial Court refused this instruction on the ground that the defendants had not pleaded the Statute involved in their answer. The question raised in the instruction was the right of a driver of a vehicle to enter or cross a highway from a private road or driveway and yielding the right of way to a vehicle on the highway. Supreme Court Rule 13 provides that if a breach of statutory duty is alleged, the statute shall be cited in connection with the allegation. To cite means to quote, as by way of authority or proof. Does that mean that the Chapter and Section number be set out? We think not. If the breach of statutory duty is alleged, the setting out of the language of the statute is

sufficient. The defense of contributory negligence was available to the defendants upon their general denial that the plaintiff was not in the exercise of due care. *Kelly v. Fletcher-Merna Co-Operative Grain Co.*, 29 Ill. App. 2d 419. *Moore v. Daydif*, 7 Ill. App. 2d 534. If the instruction correctly stated the provision of the statute, and related to the question of whether the plaintiff at the time of the accident was in the exercise of due care, it should have been given. But, this Court does not regard the refusal to give the instruction as reversible error. This Court has held that the instruction must be considered as a series. *Waugh v. Cender*, 29 Ill. App. 2d 408. In this case the giving of Defendants' Instruction No. 14, stated the law as to contributory negligence. If Raymond Carter was negligent, even though it was proved by the greater weight of the evidence that the defendants were negligent, Carter cannot recover. The doctrine of comparative negligence has not been recognized in Illinois.

While our Courts have been reluctant to override the verdict of a jury on a question of fact, it is well settled that in proper cases the Court will not only reverse the findings of a jury, but that the Courts have a duty to do so, where the verdict of a jury is against the manifest weight of the evidence. The right of a reviewing Court to reverse where the verdict is against the manifest weight of the vidence may only be exercised where the jury's verdict is palpably erroneous and wholly unwarranted from the manifest weight of the evidence. *Benkowsky v. Chicago Transit Authority*, 28 Ill. App. 2d 257; *Vasic v. Chicago Transit Authority*, 33 Ill. App. 2d 11; *Turner v. Seyfert*, 44 Ill. App. 2d 281. For the reviewing Court to substitute its judgment for that of a jury the verdict must be against the manifest weight of the evidence, that is, an opposite conclusion be clearly evident. *Niman v.*

Pecatonica Livestock Exchange, Inc., 13 Ill. App. 2d 144; *Arboit v. Gateway Transp. Co.*, 15 Ill. App. 2d 500; *Turner v. Seyfert*, 44 Ill. App. 2d 281.

Where the verdict was against the manifest weight of the evidence, involves three questions. First, were the defendants negligent? Second, was the plaintiff guilty of contributory negligence? Third, was there a causal connection between the accident and the heart attack of the plaintiff? In considering these questions, this Court is mindful of the rules of law as above stated and it has carefully considered all the evidence in the light of those rules. Upon such consideration it seems clear that the verdict of the jury and the judgment entered thereon, is clearly and palpably against the manifest weight of the evidence. There are too many "Ifs, assumptions and conclusions based upon assumptions," in this case, which apparently the jury adopted as facts.

Was the defendant, Winter, through her agent and servant Hoenow, guilty of negligence? If there was any negligence it would have to rest upon the theory of excessive speed. It is conceded that the Winter car was in its proper lane. Mrs. Hoenow, Mr. Brown and the transport driver testified the speed to be legal, and not exceeding the speed limit. Raymond Carter, Mary Carter, and Luke Carter fix the speed at 80 miles per hour. The expert, Dean Langsdorf, basing his testimony upon assumptions as to the speed of the Carter car and the Winter car, fixed the speed of the Winter car at 80 miles per hour. The skid marks were 112 feet long. The defendants call the testimony of Luke Carter "incredible." We are inclined to agree. This witness testified he was sitting in his residence about two feet from a window and saw the Winter car approximately 1000 feet to the northwest,

and then saw the collision some 169 feet south of the Carter driveway, which would be southwest of his home. In other words, if this witness is to be believed, sitting two feet from a window, he had peripheral vision of over 200 degrees. If this witness saw the collision and knew his brother was in it, why did he sit in his home and wait until his brother came across the road to ask for help? Raymond Carter made a prior statement in answer to a deposition, that his brother was not a witness. Yet, Raymond and his brother, according to their testimony, talked the matter over that night. This Court attaches very little weight to the testimony of Luke Carter.

Langsdorf testified, that basing his opinion upon a 30 mile speed of the Winter vehicle at the time of the collision, and 35 miles per hour of the Carter vehicle, the collision could not have happened. Unfortunately, for his testimony, it did happen. Assuming Langsdorf's figures were correct, if they were based upon false or wrong assumptions, they would be incorrect. All his projections were based upon a speed of 35 miles per hour by the Carter vehicle. If, Carter and his wife were wrong and their automobile had made the square turn as related by Carter, they would have to have picked up speed rapidly to attain the speed of 35 miles per hour. If they were traveling 25 miles per hour, then Dean Langsdorf's projections would not apply. However, upon the state of the evidence, this Court cannot say that the verdict of the jury as to the negligence of the defendants, based on speed alone, was clearly and palpably against the manifest weight of the evidence.

As to the question of contributory negligence on the part of the plaintiff, plaintiff and his wife testified they first saw the Winter car some 1000 to 1200 feet to the

north as they stopped just east of the highway. Langsdorf testified a car traveling 60 miles per hour travels 88 feet per second. Assuming the Winter car was doing 80 miles per hour, it would travel 117 feet per second and take just about ten seconds to travel the 1200 feet. Carter testified that just as he made his turn into the west southbound lane he looked through his right front window and saw the Winter car about 100 to 125 feet away. In that time the Carter car had traveled from a standing start 30 feet to the east line of the highway and then some 40 feet across the highway, reaching an attained speed sufficiently slow to allow him to make a square turn into the west southbound lane. He then traveled some distance before being struck from behind. Carter and his wife say he went straight across and turned. The transport driver said he slanted southwest across the highway and that he showed the wet tire marks of the Carter car to the state policeman. Assuming a start from a dead stop, a square turn south, and the necessary gradual pick-up from a standing start, several seconds must have elapsed for the Carter car to reach the point of impact. The most damaging testimony of all is Carter's testimony he saw the Winter car as he was making his turn and it was 120-125 feet away. If this was the situation, then Carter would be guilty of contributory negligence. It is necessary that Carter prove himself free of contributory negligence. Under these facts as shown by the evidence, we believe the weight of the evidence is that he did not so prove and that the manifest weight of the evidence shows that he drove directly into the path of the Winter car and was not, at the time, in the exercise of due care and caution for his safety.

The third question is whether there was a causal connection between the accident and the plaintiff's coronary

occlusion and subsequent disablement. The evidence shows he worked the next day, went to Arkansas with the truck, helped load a hog for market, and carried on in an ordinary manner until his heart attack eleven days later. When he suffered the heart attack, he was attended by Dr. Lando, who called in Dr. Maher, a heart specialist, 9 days after the heart attack. Plaintiff did not complain of any injury to his chest or heart when examined by Dr. Lando or when examined by Dr. Maher. Neither of these doctors testified to any bruises to the chest, or discoloration of the chest due to a blow or otherwise. He complained of the muscles in the back behind the shoulders and the back of the neck.

Dr. Lando and Dr. Maher attended Mr. Carter at the time or shortly after his heart attack. Dr. Meyer saw him on June 4, 1963, two and one-half years after the heart attack. Drs. Morris and Walsh did not examine Mr. Carter at any time. None of the doctors testifying for the plaintiff would testify directly that the heart attack had a causal connection with the collision on December 18th, 1960. All of them testified, on the basis, that if Carter had suffered a strong blow to the chest in the collision, there was a possible or probable causal connection between the heart attack and the injuries claimed sustained in the collision. All of these doctors refused to rule out the possibility of coincidental heart attack. Dr. Maher, the heart specialist called in by Dr. Lando and other than Dr. Lando, the only doctor to examine the plaintiff at or near the time of the heart attack, testified positively that there was no causal connection. All of the doctors testifying that there was a possibility of causal connection based their opinions upon the assumed blow to the chest, or injury to the chest, based upon the statement of the plaintiff that he was thrown with great

force against the steering wheel. This assumed injury was not proven by the evidence. The testimony was that the seat was broken and the plaintiff was thrown upon the back shelf of the back seat. This is his own testimony and he is bound by it. The testimony is that the collision was a single collision. The Winter car stopped upon impact, and if the plaintiff was thrown to the back of his car, he could not have been thrown forward into the steering wheel. He made no complaint and told no one that he was thrown against the steering wheel until afterwards. He told Dr. Lando, but at no time told Dr. Maher.

The injury to the chest was not proven by the weight of the testimony and without such proof, the testimony of the medical witnesses, based upon such injury is valueless. If there was a failure to prove the injury to the chest, there was a failure to prove causal connection between the injury and the heart attack. Unless there was such a causal connection, the total disablement of the plaintiff must be regarded as coincidental and in no way connected with the collision. This Court must hold that the plaintiff failed to prove a causal connection.

In conclusion, this Court holds that there was sufficient evidence to justify the Trial Court in denying a directed verdict for the defendants. However, the verdict of the jury was against the manifest weight of the evidence as to contributory negligence on the part of the plaintiff. But, if the plaintiff was not guilty of contributory negligence and the defendants were guilty of negligence, the proof is still totally inadequate to prove a causal connection between the injuries sustained by the plaintiff in the collision and his heart attack.

The judgment will be reversed.

Reversed.

DOVE, P.J., and WRIGHT, J., concur.

ILLINOIS SUPREME COURT OPINION

Docket No. 38835 **Agenda 28**

November, 1964.

Raymond Carter, Appellant, v. Zula Winter *et al.*, Appellees.

Mr. JUSTICE UNDERWOOD delivered the opinion of the court:

This is an appeal from the judgment of the Appellate Court for the Fourth Judicial District (50 Ill. App. 2d 467, 200 N.E. 2d 528) which reversed without remandment a judgment of the circuit court of Sangamon County entered on a jury verdict for plaintiff assessing his damages at $100,000 for injuries arising out of an automobile accident. The verdict was reached in a second trial necessitated by the inability of the jury in the first trial to agree.

Plaintiff, appellant herein, contends that constitutional infirmities arising for the first time in the Appellate Court warrant appeal to this court as a matter of right. (Ill. Const., art. VI, sec. 5; 28 Ill. 2d xxxiii.) Appellant has also complied with time limitations prescribed for petitions for leave to appeal. 28 Ill. 2d xxxi.

The opinion of the Appellate Court states it found sufficient evidence favoring the plaintiff to prevent the direction of a verdict for defendants. It also finds the verdict was against the manifest weight of the evidence as to plaintiff's contributory negligence and that the proof was "totally inadequate" to establish a causal connection between the injuries sustained by plaintiff and his subsequent heart attack. There is manifest inconsistency be-

tween these findings, particularly in view of the Appellate Court's reversal without remandment. Since the presence of constitutional questions is dependent upon the interpretation to be given the Appellate Court opinion, and since the appellant has complied with the time limitations applicable to petitions for leave to appeal, we have elected to treat this as an allowed petition for leave to appeal. See Supreme Court Rules 28 and 32 as amended Dec. 2, 1963, effective Jan. 1, 1964; 2 I.L.P. Appeal and Error, par. 8.

For convenience, we set forth the Appellate Court's substantially correct statement of facts, modified where necessary: The accident occurred on December 18, 1960, at about 3:00 o'clock P.M. on U.S. Route No. 66, a short distance north of Springfield, Illinois. The weather was clear and cold, and the pavement was dry. The highway at the point of collision is four-laned, each lane being 10 feet in width, with two lanes for northbound traffic and two lanes for southbound traffic. There is no median strip or separation of the two inner lanes other than a center line on the pavement. The highway is concrete.

Plaintiff, Raymond Carter, with his wife in the front seat with him and their small child standing behind them, started from his home which is a short distance east of the highway, and drove his automobile on a private driveway to U.S. 66. His testimony and that of his wife was that he stopped just before he entered the highway, then drove directly across the two northbound lanes, and the inner lane of the southbound lane, until he entered the outer southbound lane and there he turned to the left and proceeded down the outside southbound lane at a speed of about 35 miles per hour until he was struck in the rear by the automobile owned by defendant Zula Winter, and driven by defendant Theresa Hoenow. The left rear corner of Carter's automobile was struck by the right front corner of the

Winter automobile. The collision knocked the Carter automobile down the road until it was braked to a stop by the driver. The Winter automobile stopped about the point of impact. Carter said he saw the Winter car when he was about 30 feet east of U.S. 66, and estimated it was then about 400 yards to the north. He said he continued to watch the Winter car as he drove across U.S. 66 and until he made his turn and headed south. His estimate was that he traveled 120 to 130 feet in the southbound lane until the collision. On cross-examination, he admitted that he last saw the Winter car through the right front door, as he turned into the westernmost lane, and that it was a distance of about 30 to 40 yards away and traveling 75 or 80 miles per hour. Mrs. Carter in her testimony estimated the Winter car to be three to four hundred yards away when the Carter car stopped on the east side of the highway. Mrs. Carter testified she was knocked out for a few seconds and when she regained consciousness, she was sitting in the front seat with her husband sitting beside her holding the steering wheel. Mrs. Carter was not seriously injured and apparently the child in the back was not injured. Raymond Carter, immediately after the accident, went across the highway to his brother Luke Carter's home to get his brother and then went back to the scene of the accident. Neither Raymond Carter, his wife nor his son went to the hospital. The next day Raymond Carter returned to his regular work in the mill of Luke Carter. The following day he drove the mill truck to Arkansas and was gone about four days. About a week after the accident, he helped rope and load a 200-pound hog into the truck. On the eleventh day after the accident, plaintiff Raymond Carter had a heart attack and while in the hospital had several strokes which resulted in partial paralysis and total disability. Plaintiff's action was based on the claim that the injuries sustained in the collision caused the heart attack.

Defendant Theresa Hoenow, an employee of Zula Winter, was driving the Winter car. Riding beside her in the front seat was Mrs. Winter's brother, Ellsworth Brown. Mrs. Winter was in the back seat, but her eyesight was such that she was almost totally blind and could not see what was happening. Both Mrs. Hoenow and Mr. Brown estimated the speed of the Winter car at 50-55 miles per hour before the brakes were applied. Mrs. Hoenow testified she first saw the Carter car when it was crossing the inner southbound lane. She estimated the distance at between 100 and 125 feet. She attempted to pull to the left, but was unable to do so and, when the collision occurred, the Winter car was straddling the dividing line between the two southbound lanes.

Ellsworth Brown testified he first saw the Carter car when it was crossing the two inner lanes. It was then about 100 to 125 feet away. This witness testified that the Carter car came across the two lanes and then turned into the lane in which the Winter car was traveling south. This witness stated he had observed the posted speed limits from time to time and Mrs. Hoenow was driving within the speed limits.

Illinois State highway policeman James Merrifield was called to the scene of the accident and arrived shortly after it happened. He testified he found skid marks made by the Cadillac of Mrs. Winter and these marks were 112 feet in length. He stated the point of impact was 169 feet south of the line of the Carter driveway extended across the highway, and that he made the latter determination some three years after the accident from pictures introduced as exhibits and his recollection of the occurrence.

Luke Carter, brother of the plaintiff, testified he saw the Winter automobile 1000 feet away, watched it and his brother's car, and saw the accident. He saw this through a

window in his home, seated about two feet from the window. He estimated the speed of the Winter car at 80 miles per hour. He estimated the speed of the Carter car just before the collision at 35 miles per hour. Although Luke Carter testified he saw the accident, and knew it was his brother's car which was struck, it does not appear that he left the house, but stayed inside until his brother came back across the road to enlist his help. In answers to pretrial interrogatories and deposition questioning, Raymond Carter stated his brother, Luke, was a post-occurrence witness and did not see the accident.

Alexander Langsdorf, a witness for the plaintiff, testified as an expert on the co-efficient of friction between tires and dry concrete pavement, or in other words, skid marks and their distances. This witness was asked a long and complicated hypothetical question and his testimony was that under the facts as posed by the hypothetical question, the accident could not have happened, basing his answer on the testimony of Mrs. Hoenow that at the time of the collision she was traveling 30 miles per hour and the testimony of Carter that he was traveling 35 miles per hour. This witness stated that if the speed of the Cadillac was 70 miles per hour, the speed of the Cadillac at the time of impact would have been 47 miles an hour which would have caused a mild jolt. Basing his answer on a speed of 80 miles per hour by the Cadillac, the speed of the Cadillac at the time of the collision would have been 60 miles per hour. This witness also testified that if a person driving along the highway is struck in the rear by another vehicle, the person so struck would be thrown forward and not backward.

George Engelbach, a transport driver, testified he was driving north on U.S. 66 and saw the accident. He was driving in the outer northbound lane. He first saw the Carter car come from behind a fence on the east side of the

highway and said it did not stop, but seemed to pick up speed as it entered the highway. This witness estimated the distance of the Cadillac from the Carter Mercury at 50 feet when the Mercury crossed the center of the highway. This witness stated the Cadillac was not exceeding the speed limit. When the witness stopped his transport, he was immediately south of the Carter driveway and the point of impact was opposite his trailer, about 50 feet south of the driveway. This witness stated unequivocally that Carter did not stop before entering the highway, but that he seemed to be picking up speed, and that Carter was slanting across the highway to the southwest. He showed wet tire marks of the Carter car to the State trooper.

Much equivocal medical testimony was heard relating to the relationship between the accident and the heart attack eleven days later. While the Appellate Court held this proof "totally inadequate," it is unnecessary, in view of our ultimate conclusion, to consider this question or detail the testimony referring thereto.

We now come to a consideration of the substantive legal questions involved herein. Plaintiff urges the Appellate Court correctly found there was sufficient evidence to submit the case to the jury, and that the judgment of the trial court should be affirmed. (*Mirich v. Forschner Contracting Co.*, 312 Ill. 343.) Defendants say the judgment of the Appellate Court was correct even though the reasons therefor stated in the opinion may have been incorrect, and that its judgment should, therefore, be affirmed.

It is our opinion that only one facet of the case — the propriety of the ruling of the trial court's denial of defendants' motion for a directed verdict—requires consideration. A motion to direct a verdict presents a question of law reviewable on this appeal. (*Zank v. Chicago, Rock Island*

and Pacific Railroad Co., 17 Ill. 2d 473; *Heideman v. Kelsey*, 414 Ill. 453; *Seeds v. Chicago Transit Authority*, 409 Ill. 566.) The Appellate Court stated it found sufficient evidence to warrant submission of the case to the jury, but then proceeded to find a "total inadequacy" of proof of a causal relationship between the accident and the injuries, reversing the case without remandment, both the finding of lack of proof of proximate cause and the absence of a remanding order being incompatible with denial of a directed verdict. It also found the verdict against the manifest weight of the evidence on the issue of contributory negligence.

In determining whether defendants' motion for a directed verdict should have been allowed, all of the evidence, when viewed most favorably to plaintiff, must totally fail to establish one or more essential elements of the case. (*Ryan v. Deneen*, 375 Ill. 452; *Tucker v. New York, Chicago and St. Louis Railroad Co.*, 12 Ill. 2d 532.) That proof by plaintiff of his own exercise of due care is essential to recovery is elementary.

Plaintiff testified he initially viewed defendants' car from a stopped position about 30 feet east of the easternmost edge of the highway. At that time defendants' car was about 400 yards away, traveling in the westernmost lane of traffic. Plaintiff then proceeded across the highway, watching defendants' car approach. He stated he last saw defendants' car out of the right window as he turned south in the westernmost lane, and that it was then 30 to 40 yards away and traveling 75 to 80 miles per hour in the same lane into which plaintiff turned. While defendants maintain this testimony, standing alone, is a judicial admission of contributory negligence barring plaintiff's recovery, we have previously held (*McCormack v. Haan*, 20 Ill. 2d 75) that while a party may, by his own testimony conclusively

bar his claim or his defense, a determination that he has done so depends upon an evaluation of all of his testimony, and not just a part of it, as well as an appraisal of his testimony in the light of that of the other witnesses and a consideration of their respective opportunities to observe the facts about which they testify. McCormick on Evidence, pp. 513-516; 9 Wigmore on Evidence, 3rd ed., sec. 2594(a).

A consideration of the testimony of all of the occurrence witnesses is, however, of little assistance to plaintiff. While plaintiff, in his pretrial statements, said his brother Luke did not see the accident and knew nothing of it until told by the plaintiff, Luke testified at the trial that from his seat at the dining table in his home he saw his brother's car, which he recognized, approach and enter the highway and watched the collision. Luke further testified he first saw defendant's car "one fourth of a mile," "about 1320 feet" away, and that from that point to the point of impact 5 or 6 seconds elapsed. In his opinion the defendants' car was traveling 70 miles an hour at the time of impact despite the fact that it was undisputed that the skid marks extended 112 feet northward from the collision point. It is clear that the facts as stated require from the Cadillac a speed of which no ordinary vehicle is capable. For it to travel 1320 feet in 6 seconds and strike plaintiff's auto would require a minimum constant speed of 150 miles per hour if plaintiff's car were standing still instead of moving in the same direction. The only apparently disinterested witness was the truck driver, Engelbach, who was approaching from the south. He testified plaintiff did not stop before entering the highway, but drove across the highway in a slanting, southwesterly direction, and that the distance between the plaintiff's and defendants' cars at the time plaintiff crossed the center lane of the highway was about 50 feet. The testimony of Theresa Hoenow, the driver of defendants' car, and

Ellsworth Brown, a passenger therein, was corroborative of that of the plaintiff as it related to the distance separating the vehicles at the time plaintiff crossed into the southbound lanes. Mary Carter, plaintiff's wife, and a coplaintiff at the time of trial, testified that she first observed defendants' car when plaintiff was stopped on the east side of the highway, and that it was then 300-400 yards away; that she continued to watch it as they crossed the highway, and that it was still 200-300 yards away when they turned south. She further stated they traveled 129-30 feet before being struck, and that their speed was 30-35 miles per hour at the time of impact. While she would make no estimate of the speed of defendants' car, it is apparent that the Cadillac must have traveled at an impossible rate of speed to cause the collision under the facts, distance and speeds as thus testified to.

In our judgment, plaintiff's own testimony that he knowingly turned his comparatively slowly moving auto into the lane of traffic occupied by an approaching car then 120 feet or less away and traveling 75 or 80 miles per hour, when viewed in the light of the rest of his testimony and that of the other witnesses, conclusively establishes his guilt of contributory negligence as a matter of law. One cannot knowingly expose himself to danger and subsequently recover damages for an injury which, by the employment of reasonable precaution and circumspection, he might have entirely avoided. *Tucker v. New York, Chicago and St. Louis Railroad Co.*, 12 Ill. 2d 532; *Dee v. City of Peru*, 343 Ill. 36; *Illinois Central Railroad Co. v. Oswald*, 338 Ill. 270; *Wilson v. Illinois Central Railroad Co.*, 210 Ill. 603; *Beidler v. Branshaw*, 200 Ill. 425.

Consequently, we hold that both the trial court and Appellate Court were in error concerning the denial of defendants' motion for a directed verdict, which should have

been granted. It is, therefore, unnecessary to consider the other issues raised. However, since it is only the judgment of the Appellate Court and not its reasons therefor which determine affirmance or reversal (*Robinson v. Workman*, 9 Ill. 2d 420; *Harding Co. v. Harding*, 352 Ill. 417; *Little v. Blue Goose Motor Coach Co.*, 346 Ill. 266), we affirm its ultimate determination.

The judgment of the Appellate Court for the Fourth District is affirmed.

Judgment affirmed.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 30 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court

of the

United States

OCTOBER TERM, A. D. 1965

No. 223

RAYMOND CARTER,
Petitioner,

VS.

ZULA WINTER, also known as MRS. A. E. WINTER, and THERESA HOENOW,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court

of the

United States

OCTOBER TERM, A. D. 1965

No. 223

RAYMOND CARTER,
Petitioner,

VS.

ZULA WINTER, also known as MRS. A. E. WINTER, and THERESA HOENOW,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

(c) QUESTIONS PRESENTED FOR REVIEW:

We do not agree with Petitioner that the questions presented for review (Petition p. 2) are as stated by him. On the contrary, we respectfully suggest that the only question is:

1. Will this Court entertain a Petition For Certiorari to the Supreme Court of Illinois to review its decision based upon a question of local Illinois law in which there is no Federal question involved?

(e) STATEMENT OF THE CASE:

This case does not involve a situation where "Petitioner was proceeding south in the outside lane of traffic when his automobile was hit in the rear by the automobile being operated by Theresa Hoenow and proceeding in the same direction" (Petition p. 3). It involves a case where the defendant Hoenow was proceeding south in the outer lane of a preferential highway when the plaintiff suddenly emerged from a private driveway on the east side thereof, drove across and into the defendants' lane of travel immediately in front of her and turned to the south, whereupon, the left rear of his car was struck by the right front corner of the defendants' car which was then straddling the line between the two southbound lanes in an effort to avoid the collision.

In the Trial Court our motions for directed verdict and for judgment notwithstanding the verdict were overruled and judgment was entered for the plaintiff on a jury's verdict. Although in its Opinion the Appellate Court stated that there was sufficient evidence for the Trial Court to deny the motion for directed verdict, it found that the verdict was against the manifest weight of the evidence both on the question of contributory negligence and of proximate cause, and reversed, without remandment. Upon plaintiff's appeal to the Supreme Court of Illinois, we contended that the *judgment* of the Appellate Court reversing the Trial Court's judgment was correct, but that the *reasons* given therefor in the Opinion were incorrect in that the plaintiff was guilty of contributory negligence

as a matter of law and the Trial Court should have directed a verdict; that therefore there was no constitutional question involved. (Appellee's Brief, Add. Rec. 3)

The Supreme Court held that, based upon the plaintiff's own testimony, viewed in the light of all the other testimony, the plaintiff was guilty of contributory negligence as a matter of law, and the Trial Court should have directed a verdict for the defendants; that the Appellate Court's reversal of the judgment without remandment, was a correct decision, although its reasons given therefor were incorrect; that since the Appellate Court's *decision* was correct, the Supreme Court affirmed.

Since the Supreme Court of Illinois did, in fact, review the entire case and wrote an Opinion thereon, it makes no difference whether such review was by reason of an appeal from the Appellate Court as a matter of right, or was an allowed Petition for Leave to Appeal (Petition p. 6).

SUMMARY OF ARGUMENT

I.

This Court will not exercise its discretion to review a decision of the Illinois Supreme Court in a civil automobile accident case where no Federal question is involved but only the determination of a question of local State law. What constitutes negligence or contributory negligence in an automobile accident case is purely a matter of Illinois State law upon which the Federal Courts follow the interpretations of the State Supreme Court.

Under Illinois law, the plaintiff must affirmatively prove himself free from contributory negligence. He will be bound by his own judicial admissions. If he knowingly departs from a place of safety and enters a place of known danger, he is contributorily negligent as a matter of law and cannot recover for his injuries. If upon a consideration of all the evidence, all reasonable minds would come to the conclusion that the plaintiff's conduct was negligence which contributed to his injury, then the question of contributory negligence becomes a question of law for the Court, which should direct a verdict for the defendant.

In deciding this case, no constitutional right of the plaintiff was violated and no Federal question was involved.

II.

Plaintiff's own testimony that just before he entered the defendant's lane of traffic, he observed the defendant's car 30 to 40 yards away and travelling 75 to 80 miles per hour, yet he proceeded on into and turned into that lane, was a judicial admission which convicted him of contributory negligence as a matter of Illinois law. Such judicial admission was not overcome by any other evidence.

III.

This Court will not exercise its discretion to review the decision of the Illinois Supreme Court merely because such decision might be inconsistent with some prior decision of that Court, or because it might have been an erroneous decision.

IV.

For this Court to accept the principle urged by the petitioner it would have to hold that, regardless of the evidence or lack thereof, no State Court, under any circumstances, can ever direct a verdict for either party.

ARGUMENT

I.

WE RESPECTFULLY SUBMIT THAT THIS COURT WILL NOT EXERCISE ITS DISCRETION TO REVIEW A DECISION OF THE HIGHEST COURT OF A STATE WHERE THAT DECISION INVOLVES NO FEDERAL QUESTION BUT ONLY THE DETERMINATION OF A QUESTION OF LOCAL STATE LAW.

Supreme Court Rule 19.

A. The United States Supreme Court will not review a judgment of a State Court if the record shows that it was or may have been rendered upon a ground which did not involve a federal question and which was sufficient to sustain it.

Herb v. Pitcairn, 324 U.S. 117, 125, 89 L. Ed. 789, 794;

Fox Film Corporation v. Muller, 296 U.S. 207, 210, 80 L. Ed. 158, 159;

Berea College v. Kentucky, 211 U.S. 45, 53, 53 L. Ed. 81, 85;

Ann. 309 U.S. 559, 84 L. Ed. 925, 941.

B. What constitutes negligence or contributory negligence in an automobile accident case for personal injuries is purely a matter of Illinois State law, and the Federal Courts uniformly accept the determination and interpretation thereof placed thereon by the highest State Court.

Erie R. R. Co. v. Tompkins, 304 U.S. 64, 78, 82 L. Ed. 1188, 1194.

1. *It is the law of Illinois that a person may not knowingly depart from a place of safety and enter a place of*

known danger and then recover for injuries occasioned thereby.

Illinois Central R. R. Co. v. Oswald, 338 Ill. 270, 275;

Wheat v. Baltimore & Ohio R. R. Co. (CCA 7), 262 F. 2d 289, 291; Cert. Denied, 359 U.S. 1005, 3 L. Ed. 2d 1034;

Albers v. Continental Grain Co. (CCA 7), 220 F. 2d 847, 849.

2. *It is the law of Illinois that a plaintiff must affirmatively prove that he himself was in the exercise of ordinary care for his own safety and was not himself guilty of negligence which proximately caused or contributed to his own injuries.*

Illinois Central R.R. Co. v. Oswald, 338 Ill. 270, 274;

Dee v. City of Peru, 343 Ill. 36, 41;

Beiter v. Erb (CCA 7), 259 F. 2d 911, 913; Cert. denied, 359 U.S. 953, 3 L. Ed. 2d 761. Rehearing denied 359 U.S. 981, 3 L. Ed. 931.

3. *It is the law of Illinois that a party will be bound by his own judicial admission.*

McCormick v. Haan, 20 Ill. 2d 75, 169 N.E. 2d 239;

Tennes v. Tennes, 320 Ill. App. 19, 50 N.E. 2d 132. Leave to appeal denied;

Huber v. Black & White Cab Co., 18 Ill. App. 2d 186, 151 N.E. 2d 641. Leave to appeal denied;

Waugh v. Cender, 29 Ill. App. 2d 408, 173 N.E. 2d 860. Leave to appeal denied;.

Nowak v. Schrimpf, 44 Ill. App. 2d 309, 194 N.E. 2d 547.

4. *It is the law of Illinois that, while ordinarily the questions of negligence, contributory negligence and proxi-*

mate cause are for the jury, if under the evidence in a particular case, the Court determines that all reasonable minds would come to only one conclusion, then each of those questions becomes a question of law for the Court, and the Court should take the case from the jury and direct a verdict.

Tucker v. New York, Chicago & St. Louis R. R. Co., 12 Ill. 2d 532, 147 N.E. 2d 376, 377;

Briske v. Village of Burnham, 379 Ill. 193, 39 N.E. 2d 976, 979;

Albers v. Continental Grain Co. (CCA 7), 220 F. 2d 847, 849.

5. *Where the plaintiff fails to prove some essential element of his case, Illinois has always recognized the right and the duty of the Court to take the case from the jury and to direct a verdict for the defendant.*

Sec. 68.1 Civil Practice Act (Ch. 110, para. 68.1 Ill. Rev. Stats. 1963).

6. *Both by decision and by the express terms of the Federal Rules of Civil Procedure the Federal Courts have recognized a similar right in those Courts.*

Rule 50, Federal Rules of Civil Procedure;

Moore v. Chesapeake & O. R. R. Co., 340 U.S. 573, 578, 95 L. Ed. 547, 551;

Rogers v. Mo. Pac. Railway Co., 352 U.S. 559, 564, 1 L. Ed. 2d 515, 519.

7. Where the highest Court of the State of Illinois has reviewed all of the evidence and the questions of law and has made a finding that, in the case at bar, the plaintiff by his own judicial admission and supported by a consideration of all the other evidence, knowingly left a place of safety and entered into a place of known danger, he has failed in his burden of proving himself in the exercise of

ordinary care for his own safety; that the plaintiff has therefore not made a submissible case to the jury and the Trial Court should have directed a verdict for the defendants; that the Appellate Court's decision reversing the Trial Court's judgment without remandment was therefore correct even though the reasons given in the opinion therefor were incorrect, and then affirming the Appellate Court decision; no constitutional right of the plaintiff has been violated. Only questions of Illinois law are involved, and the decision of the Illinois Supreme Court is completely supported by the Illinois Law and no Federal question was either involved or necessary to the determination of the case. Therefore, we respectfully submit that either this Court is without jurisdiction to review this case, or, in the alternative, this Court will not exercise its discretion to review this case.

8. The case at bar does not involve principles the settlement of which is of importance to the public as distinguished from that of the parties, and therefore no compelling reason exists for this Court to review this case.

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 79, 99 L. Ed. 897, 904.

9. The decision of the Illinois Supreme Court could also have been properly based upon the lack of proof of causal connection between the accident and the subsequent heart attack, but the Court found it unnecessary to pass on that question. (Petition p. 56.)

10. It having been unnecessary for the Illinois Supreme Court in arriving at its decision to consider any constitutional questions, that Court properly accepted review of the case on the basis of an allowed Petition for Leave to Appeal; properly disposed of the case; properly denied the Petition for Rehearing; and properly denied the Motion to Reconsider.

II.

THE EVIDENCE WHOLLY FAILED TO ESTABLISH THE ESSENTIAL ELEMENT OF THE PLAINTIFF'S CASE THAT HE HIMSELF WAS IN THE EXERCISE OF ORDINARY CARE AND WAS NOT HIMSELF GUILTY OF ANY NEGLIGENCE WHICH APPROXIMATELY CAUSED OR CONTRIBUTED TO HIS OWN INJURIES.

Plaintiff's own testimony that just before he entered the defendant's lane of travel at a speed of 35 miles per hour, he observed the defendant's car 30 to 40 yards away (90 to 120 feet) and travelling at a speed of 75 to 80 miles per hour, is sufficient to convict him of contributory negligence as a matter of law. Prior to entering that lane of travel, the plaintiff was in a place of safety; yet, knowing that the defendant's car was only about 100 feet away, travelling at 75 to 80 miles per hour or less than two seconds away, he deliberately left that place of safety and entered upon a place of danger, which caused his alleged injuries.

Plaintiff's Petition would give this Court the erroneous impression that the plaintiff testified only once to those facts and in so doing, stated that his testimony was only a "guess" (Petition 22). Counsel deliberately omits any reference to the other *two* times when the plaintiff testified to the same set of facts in a positive manner (Supp. Abst. 1-2) (Add'l Rec. 2).

Also, plaintiff's own testimony that he observed the defendant's automobile travelling from a point 400 yards away to a point 30 to 40 yards away while he himself travelled only 20 yards to the place where he turned into the defendant's lane of traffic, which would make the defendant travelling approximately 20 times as fast as the defendant, or over 200 miles per hour, is both testimony of

a physical impossibility and is further a judicial admission that before he entered defendant's lane of travel, he knew that he was deliberately placing himself in a position of known danger.

The Illinois Supreme Court, before accepting the plaintiff's own testimony as to speeds and relative distances, also reviewed the testimony of all of the other witnesses. It found it necessary to completely reject the testimony of plaintiff's other witnesses Mary Carter (his wife) and Luke Carter (his brother) because such testimony was also a physical impossibility. Mary Carter's testimony that as they entered defendant's lane of travel at 35 miles an hour defendant's car was some 250 to 300 yards away (750 to 900 feet), yet, while plaintiff travelled approximately 140 feet, the defendant travelled approximately 900 feet or approximately 6 times as fast would have placed defendant's speed at over 200 miles per hour. And this testimony is without consideration of the fact that the defendant had applied her brakes and laid down 112 feet of skidmarks in attempting to stop, while plaintiff's car remained in motion. Brother Luke Carter testified that while the plaintiff travelled approximately 200 feet at 35 miles per hour, the defendant travelled over one-quarter of a mile (in six seconds) which would also require a speed of over 200 miles per hour, and this without considering the application of defendant's brakes, and that the plaintiff was still in motion. Thus, plaintiff's own judicial admission was not controverted nor emasculated by a consideration either of his other testimony or of the testimony of his other witnesses, and consequently, he was bound by it. Such testimony convicted the plaintiff of contributory negligence as a matter of law.

It is interesting to note that the plaintiff's own testimony as to the distance the defendant's car was from him at the

time he entered its lane of travel (90 to 120 feet) is corroborated by the testimony of the defendant Hoenow (100 to 125 feet) Brown (100 to 125 feet) and Engelbach (50 feet).

On page 23 of the Petition, plaintiff's counsel states that it was an undisputed fact that the point of impact was 169 feet south of the driveway. Such statement is erroneous. Only Trooper Merrifield placed the point of impact 169 feet south of the driveway, and he located it from memory, some three years after the accident when he revisited the scene accompanied by plaintiff's counsel, and it was only upon the basis of his location of the point of impact that plaintiff's counsel assumed that the skidmarks commenced 57 feet south of the driveway. Plaintiff himself placed the point of impact 120 to 130 feet south. His wife, Mary Carter, 129 to 130 feet south; his brother, Luke Carter, 150 to 160 feet south; and the independent witness, Engelbach, at a point opposite the rear of his 50 foot long unit which was parked with its front end immediately south of the driveway.

III.

IT IS RESPECTFULLY SUBMITTED THAT THE UNITED STATES SUPREME COURT WILL NOT REVIEW THE DECISION OF THE HIGHEST STATE COURT MERELY BECAUSE SUCH DECISION MIGHT BE INCONSISTENT WITH SOME PRIOR DECISION OF THAT COURT OR BECAUSE IT MIGHT HAVE BEEN ERRONEOUSLY DECIDED.

Patterson v. Colorado, 205 U.S. 454, 461, 51 L. Ed. 879, 880;

Beck v. Washington, 369 U.S. 541, 554, 8 L. Ed. 2d 98, 110.

On pages 28-29 of the Petition counsel argues that

Pennington v. McLean, 16 Ill. 2d 577, 158 N.E. 2d 624, which he states cannot be distinguished from the case at bar, holds that *Tucker v. New York, Chicago and St. Louis Railroad Co.*, 12 Ill. 2d 532, 147 N.E. 2d 376; *Dee v. City of Peru*, 343 Ill. 36; *Illinois Central R. R. Co. v. Oswald*, 338 Ill. 270; and *Hering v. Hilton*, 12 Ill. 2d 559, 147 N.E. 2d 311 are not applicable.

We respectfully submit that on page 29 of the Petition, his counsel suggest the element which distinguishes the Pennington case from the case at bar, where he says with reference to the case at bar:

> . . . "It is undisputed that the plaintiff was aware of the approach of the defendant's vehicle."

Yes, plaintiff was not only aware of the approach of the defendant's automobile, but, under his own testimony, it was less than two seconds away when he deliberately drove in front of it and turned in its lane of travel.

But, even if Pennington is a holding contrary to the holding in the case at bar, such inconsistency is not such a compelling reason as will require this Court to review this case.

IV.

IT IS RESPECTFULLY SUBMITTED THAT FOR THIS COURT TO ACCEPT THE PRINCIPLE URGED BY THE PETITIONER, IT WOULD BE COMPELLED TO HOLD THAT, REGARDLESS OF THE EVIDENCE OR LACK THEREOF, NO STATE COURT UNDER ANY CIRCUMSTANCES CAN EVER DIRECT A VERDICT FOR EITHER PARTY.

Let us consider a few examples in order to demonstrate the absurdity of such an argument. Illinois does not recognize comparative negligence; contributory negligence on the part of the plaintiff is a complete bar to recovery. Suppose

then that a plaintiff, approaching a preferential highway at 90 miles per hour, observes heavy traffic on that highway travelling at high but lawful speeds and within a few feet of the intersection, closes his eyes, and, without stopping, enters and drives directly in front of or into the side of a car on that highway, would this Court say that the question of plaintiff's contributory negligence and of the alleged negligence of the driver of the adverse vehicle were solely within the determination of the jury and that no Court could rightfully take the case from the jury? Or, instead of a preferential highway, let us make it a railroad crossing with a train rapidly approaching and within a few feet of the crossing when the plaintiff deliberately disregards crossing gates and crossing lights and deliberately drives in front of the train. Would this Court say that no State Court could rightfully take that case from the jury?

And since there is no Federal Negligence Law but the Federal Courts follow the law of the State wherein the accident occurred, would not the Federal Court, in a diversity case, under such a state of facts, direct a verdict for the defendant? The aforesaid examples are different only in degree from the situation in the case at bar. In this case, the plaintiff, under his own testimony and corroborated by all of the evidence, except that which is contrary to physical law, knowingly drove his comparatively slow-moving vehicle into the defendant's lane of traffic when the defendant's car was less than two seconds away. Plaintiff did not try to *cross* the defendant's lane of travel; he drove into it and turned immediately in front of the defendant's car. As held by the Illinois Supreme Court, all reasonable minds must agree that the plaintiff was guilty of contributory negligence as a matter of law, and that this was a proper case in which the Court should interfere to prevent a gross miscarriage of justice.

Petitioner suggests (Petition pp. 32-33) that for the Court to take away this badly injured plaintiff's verdict is the taking of his property without due process of law. But the argument applies with equal force to the taking of the defendant's property without due process of law by a Court permitting an improper verdict to stand.

V.

SUMMARY

It is respectfully submitted that this Court will not and should not, exercise its discretion to review a decision of the highest court of the State of Illinois decided solely upon a question of local State law and where no Federal question was involved or necessary to its decision. The Illinois Supreme Court properly held that under the evidence and the Illinois law, the plaintiff was guilty of contributory negligence as a matter of law which bars any recovery by him. In such a case no constitutional question, either under the Constitution of the State of Illinois or the Constitution of the United Sates, is involved. This Court will not and should not review the evidence and substitute its own judgment for that of the Illinois Supreme Court, nor hold that under no circumstances can a State Court direct a verdict.

We therefore respectfully pray that this Court deny the Petition For Writ of Certiorari.

Respectfully submitted,

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